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In the Supreme Court of the United States

OCTOBER TERM, 1954

ROBERT A. McALLISTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 426-430) is not reported. The opinion of the Court of Appeals for the Second Circuit (R. 446-449) is reported at 207 F. 2d 952.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1953 (R. 449). A petition for rehearing and alternative relief was denied December 3, 1953 (R. 462-463). The petition for certiorari was filed on February 2, 1954, and was

granted on April 5, 1954. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, a polio victim, claims damages from the United States on the theory that he contracted the disease as a proximate result of conditions negligently created aboard a government vessel and allegedly conducive to the transmission of polio. The district court accepted the theory and awarded petitioner judgment. The court of appeals reversed on the ground that the evidence did not support the ultimate finding that the Government's asserted negligence was the proximate cause of petitioner's polio. The questions presented are:

1. Whether the court of appeals properly reversed the trial court judgment in view of the fact that petitioner, according to his own proof, had contracted the disease and had taken sick before the date found by both courts below to have been the earliest date on which the allegedly negligent conditions arose.

2. Whether the court of appeals adopted the appropriate standard of appellate review and correctly applied that standard when it concluded, for reasons independent of the circumstances stated in question 1, that the trial judge's finding of proximate causation could not be sustained.

STATUTE INVOLVED

The pertinent provisions of the Suits in Admiralty Act (41 Stat. 525, 46 U.S.C. 741 *et seq.*) are set forth in the Appendix, *infra*, pp. 46-47.

STATEMENT

This action was brought by petitioner McAllister against the United States under the Suits in Admiralty Act to recover damages for the alleged negligence of the United States in (1) creating or permitting conditions conducive to the transmission of poliomyelitis on board the *S. S. Edward B. Haines* and in (2) failing to furnish prompt medical treatment, thus causing him to suffer permanent injury from the disease.

On July 23, 1945, McAllister signed on the *Haines*, a vessel owned by the United States and managed, under a General Agency Agreement, by the Cosmopolitan Shipping Company, Inc. (R. 19, 431). The *Haines* sailed from New York on July 31, 1945, for the following ports, remaining at each port for the periods indicated (R. 77, 164-165):

Port	Arrival	Departure
Port Said, Egypt	August 19, 1945	August 21, 1945
Colombo, Ceylon	September 3, 1945	September 4, 1945
Port Swettenham, Malaya	September 12, 1945	September 12, 1945
Singapore	September 13, 1945	September 14, 1945
Hong Kong	September 19, 1945	September 23, 1945
Shanghai	September 26, 1945	November 1, 1945
Hong Kong	November 5, 1945	November 7, 1945
Shanghai	November 11, 1945	November 23, 1945
Tsingtao	November 25, 1945	December 3, 1945

A "standing order" was posted on board ship warning the crew "about various diseases that might be contracted ashore" (R. 329). This notice was "posted in all the tropical climates down there, Hong Kong, Singapore, and so on" (R.

399).[1] The Master of the *Haines* also "mustered the crew on several occasions" and "told the men to watch out for venereal disease, as well as polio and other diseases," to "eat in American-maintained establishments," and to "try to keep away from native establishments" (R. 405).

McAllister went ashore at Colombo (R. 165). And during the vessel's first visit to Shanghai "between the 26th of September and the first of November" he went ashore "quite a few times" (R. 163, 165, 30). While ashore at Shanghai, McAllister "ran across an Army sergeant" from his home town (R. 82). They went to the hotel where Army soldiers were stationed and where McAllister was entertained (R. 82). They also "attended different theatres" and "clubs in Shanghai" (R. 82, 166).

After McAllister had been ashore "several times at Shanghai" between September 26 and November 1, 1945, the *Haines*, on the latter date, departed for Hong Kong, arriving there on November 5, 1945 (R. 30, 164-165, *supra*, p. 3). Two days later, on November 7, 1945, the vessel sailed from Hong Kong for the return voyage to Shanghai (R. 164-165). It was on this return trip, McAllister declared, that he took sick and experienced the first symptoms of polio: "stiffness of the neck," "dizziness," "difficulty in swallowing," and "pain

[1] Pharmacist's Mate Napier testified that he posted notices "on the bulletin boards over the ship, stating that there were illnesses ashore, contagious diseases, but as to what diseases I don't remember what the paper said" (R. 305-306).

primarily in the back of the neck at the base of the head" (R. 21-22, 30, 169; see also, R. 106). As the petition for a writ of certiorari and petioner's brief state, McAllister "first took sick about the 9th or 10th of November, 1945, while the vessel was on the voyage from Hong Kong back to Shanghai" (Pet., p. 7; Br., p. 7; R. 78). Another member of the *Haines* crew testified that "on the voyage from Hong Kong to Shanghai, that is, our second voyage, Mr. McAllister at that time complained of feeling bad * * * or feeling stiff, not being able to get around as he should" (R. 197, 199).

After the *Haines'* return to Shanghai on November 11, McAllister did not go ashore (R. 165).[2] The vessel stayed in Shanghai, this second time, from November 11 to November 23, 1945, when it sailed to Tsingtao (R. 164-165; *supra*, p. 3). "During her second stay in Shanghai, Army trucks for the Chinese Nationalist Army were loaded on board with the help of Chinese coolies, and Chinese soldiers and mechanics were taken on board to be transported to Tsingtao" (R. 147, 132). Separate toilet facilities were "provided by the ship for the Chinese who thus came board" (R. 132). These facilities consisted of a temporary trough extending over the ship's side with running water supplied by a hose laid on the deck (R. 132). McAlister never used those facilities but testified that

[2] Nor had he gone ashore at Port Said, Port Swettenham, Singapore, and Hong Kong (R. 165).

because the hose was turned off he was required on one or two occasions to go up on deck and open the valve (R. 82-83, 163). The district court found that no arrangements were made to keep the Chinese on board from using the ship's regular toilet facilities (R. 432), that the Chinese did use the crew's toilet facilities,[3] and that they also used a common drinking fountain on deck (R. 432).

During the voyage from Shanghai to Tsingtao, November 23 to 25, 1945, McAllister reported to the Purser the polio symptoms he had first experienced on November 9-10, 1945 (R. 170, 433; *supra*, pp. 4-5). He voluntarily continued his duties until November 28, 1945, when he was relieved of duty and put to bed (R. 433). On December 1, 1945, he was removed from the *Haines* and transferred ashore to the Marine Corps Hospital at Tsingtao (R. 86, 433). Subsequently, he was flown to the Navy hospital ship *U. S. S. Repose* at Shanghai where he was diagnosed as a poliomyelitis case (R. 86-87). In January 1946 he was admitted to the United States Marine Hospital of the Public Health Service in San Francisco (R. 87).

On July 16, 1946, McAllister instituted suit under the Jones Act (38 Stat. 1185, 46 U. S. C. 688) against the General Agent, the Cosmopolitan Shipping Co., seeking damages for personal injuries caused by the disease (R. 4-5). In that action, as in the instant one, he alleged that his injuries were

[3] There was no evidence that officers' toilet facilities were used (R. 203-204). Petitioner was an officer (Second Assistant Engineer) (R. 431).

the result of the Master's negligence in (1) creating conditions conducive to the transmission of polio on board the *Haines* and in (2) failing to provide prompt medical treatment. A jury returned a general verdict against Cosmopolitan Shipping Co. for $100,000 and judgment pursuant to that verdict was affirmed by the Court of Appeals for the Second Circuit. 169 F. 2d 4. This Court granted certiorari and, on June 27, 1949, without reaching the negligence issues, reversed the courts below on the ground that the United States, rather than the General Agent, was petitioner's employer and that the General Agent could not, therefore, be held liable in a negligence action under the Jones Act. *Cosmopolitan Shipping Co. Inc.* v. *McAllister*, 337 U. S. 783.

By the Act of December 13, 1950, 64 Stat. 1112, 46 U.S.C. 745, Congress amended and extended the limitations period of the Suits in Admiralty Act by providing that where a suit against a General Agent had been dismissed solely because the improper party defendant had been sued, an action against the United States might be brought within one year after the passage of the amendatory Act. McAllister, in February 1951, filed a libel against the United States in the District Court for the Southern District of New York seeking to collect the $100,000 verdict set aside by this Court in the *Cosmopolitan* case. (Admiralty No. 167-375, S.D. N.Y.) The basis for that claim was that the jury's verdict in the *Cosmopolitan* case was *res judicata* against the United States as principal (R. 51). On

June 13, 1951, the district court, ruling that *res judicata* could not be invoked against the United States in the circumstances of the case, dismissed the libel. *McAllister* v. *United States*, 1951 A.M.C. 1373. McAllister failed to perfect an appeal to the court of appeals from that dismissal (R. 51).

Instead, on July 5, 1951, McAllister brought the present action against the United States in a different district court—the District Court for the Eastern District of New York (R. 1, 3-12). This new libel, as amended, asserted negligence on the part of the United States in (1) creating conditions conducive to the transmission of poliomyelitis by permitting the poliomyelitis virus to be spread by the Chinese who came aboard the vessel and in (2) failing to furnish McAllister with prompt medical treatment (R. 52-53, 75).[4]

The district court rejected the claim that the United States had negligently failed to provide McAllister with adequate care and treatment (R. 429-430). However, it found "by a preponderance of credible evidence" that the United States was negligent in creating conditions "which were conducive to the transmission of polio", by allowing the Chinese who boarded the *Haines* at Shanghai after November 11, 1945, to use the ship's regular toilet facilities and common drinking fountain (R.

[4] Petitioner's original libel also sought maintenance and cure, and advanced the same *res judicata* contention which had earlier been rejected by the District Court for the Southern District of New York (R. 3-12). Those two claims were withdrawn at trial (R. 52-53, 426).

429, 432.) Despite petitioner's testimony that he had experienced the symptoms of polio before the *Haines* returned to Shanghai on November 11, 1945, the district court was of the view that "it may reasonably be inferred from the evidence that [McAllister] contracted polio on shipboard due to the negligence of respondent rather than having contracted it ashore" (R. 429, 433). Judgment of $80,000 was entered for petitioner (R. 435).

On appeal, the Court of Appeals for the Second Circuit, by a unanimous court (L. Hand, Swan, A. Hand, J.J.), reversed (R. 449). It agreed with the district court that there was no negligence in the treatment of petitioner (R. 448). It also found, as had the district court, that the Chinese came on board the vessel after November 11, 1945, "during her second stay in Shanghai" (R. 432, 447). However, the court of appeals stated that it was not clear that the action of the respondent taken with respect to the Chinese constituted negligence, and questioned whether there was a legal duty which would force respondent to maintain strict segregation or, even further, keep the Chinese off the boat altogether.[5] But the court's holding was that, assuming the negligence which seemed to it

[5] In the court below, as in this Court, petitioner asserted that the trial judge found respondent negligent in bringing the vessel "into an epidemic area and in close proximity with carriers of poliomyelitis" and permitting "Chinese coolies and others from said epidemic area" to come aboard and to mingle with the crew. (Pet. Br., p. 9). The trial judge, however, did not find that Shanghai was a polio epidemic area. (See R. 379, 431-434). See *infra*, pp. 38-44.

"highly doubtful," the evidence did not support the trial court's finding that the Government's negligence was the proximate cause of McAllister's polio (R. 448-449). The court noted in this connection that from the facts proven either of several conflicting inferences, on some of which respondent would not be liable, were equally permissible and the cause highly speculative, so that petitioner, as the party having the burden of proof, could not succeed (R. 449). It accordingly ordered the libel dismissed (R. 449).

SUMMARY OF ARGUMENT

I

Petitioner's entire case rests on the proposition, accepted by the trial court but rejected by the court of appeals, that the proximate cause of his polio was the Master's conduct in allowing the Chinese to board the *Haines* at Shanghai. But petitioner's own testimony, read in conjunction with the concurrent factual findings of the district court and the court of appeals, reveals a basic inconsistency.

The trial judge's factual findings are explicit as to the date on which the Chinese first boarded the *Haines*. After noting that the vessel took a short trip to Hong Kong and arrived back at Shanghai on November 11, 1945, the findings emphasize the fact that it was *after* that date that the Chinese were first allowed aboard. The court of appeals, independently concurring in that finding, also found that it was during the vessel's second stay in Shanghai, *i.e.*, between November 11 and 23,

1945, that the Chinese were first allowed aboard.

The trial court made no finding as to the date petitioner took ill. But petitioner's unequivocal testimony, corroborated by witnesses whom he called, is that the first symptoms of his polio appeared on November 9-10, 1945, during the vessel's return trip from Hong Kong to Shanghai. In asserting his claim for relief in this Court, he adheres to this position (Pet., p. 7; Pet. Br., p. 7).

Since it is the petitioner's position that he took ill with polio during the return voyage to Shanghai, and since it was found that the Chinese first boarded the vessel after its arrival in Shanghai on November 11, 1945, it would seem clear that on this record the asserted negligence in allowing the Chinese aboard cannot be regarded as the cause of petitioner's polio. This circumstance, though not relied upon by the court of appeals, convincingly supports that court's conclusion, based on independent considerations (Point II B), that the record does not warrant a finding of proximate causation.

II

Apart from the basic inconsistency as to dates, it is submitted that the court of appeals adopted the appropriate standard of review (the "clearly erroneous" test) and that it correctly applied that standard in overturning the finding of proximate causation.

A. Seeking support from the court of appeals' affirmance of a jury verdict in his favor in the prior Jones Act suit against the General Agent

(*McAllister v. Cosmopolitan Shipping Co., Inc.*, 169 F. 2d 4 (C.A. 2), reversed on the ground that the General Agent was not petitioner's employer for the purpose of a Jones Act suit, 337 U.S. 783), petitioner argues that the court below must have applied an erroneous standard of review in overturning the trial judge's finding of liability in the instant case. Noting that it had been unable to determine in the first case on which of two theories of negligence (permitting conditions conducive to polio or improper treatment and care) the jury's verdict had been based, the court of appeals correctly pointed out that, in any event, it was not bound by the prior case and that it had greater latitude in reviewing a trial judge's finding than in reviewing a jury verdict.

The Seventh Amendment to the Constitution, reflecting special considerations of policy and tradition, prohibits re-examination of facts tried by a jury. This Court has accordingly held that if there is some ("more than a scintilla") evidence to support a jury verdict it may not be disturbed, even though the appellate tribunal is convinced that it was erroneous. No similar limitations exist in the case of a non-jury trial, and the decisions of this Court, interpreting Rule 52(a) of the Federal Rules of Civil Procedure, make plain that, even though there is some evidence to support a trial judge's finding, it is the function of the appellate tribunal to set it aside if examination of the record leaves that court with the settled conviction that error has been committed.

Rule 52(a), which has been uniformly held applicable to appeals in admiralty, superseded the earlier statutory provision (R.S. 649) that the finding of a trial judge sitting without a jury "shall have the same effect as the verdict of a jury." The expressed aim of the new Rule was to confer upon reviewing tribunals the same powers which they traditionally exercised in hearing appeals in equity. In order to enable the appellate court to discharge its broadened responsibility and to apply the "clearly erroneous" test, the Rule, in contrast to R.S. 649, requires that the trial court enter specific factual findings. With this essential aid, the reviewing judges are equipped, not only to examine the subsidiary determinations of fact to determine whether they are supported by the record as a whole, but to test the validity of the inferences drawn from the subsidiary findings.

B. When a record has been examined by the initial reviewing court and found wanting, this Court will not intervene unless it is convinced that the standard of review has been misapprehended (which is plainly not the case here) or grossly misapplied. Consideration of the relevant factors shows that here the court of appeals was entirely warranted in its conclusion, based upon a full examination of the record, that the trial court's finding of proximate causation was not well founded.

The trial judge's findings singled out as the cause of petitioner's illness the Master's act in permitting Chinese to board the ship at Shanghai and his fail-

ure to keep them completely isolated. It is accordingly necessary to consider, at the outset, the existing knowledge concerning the nature of poliomyelitis.

The epidemiology and modes of transmission of the disease are still a mystery to medical science. Various suggested answers are still in the conjectural stage. Flies, for example, have long been suspected of carrying and transmitting the polio virus. Whether the virus can be waterborne is highly uncertain. While sewage has been suggested as a conceivable source of infection, it has been observed that epidemics occur in those countries where sanitation and hygiene have made the greatest advance.

It does not appear that droplet infection (dissemination of virus by droplets lingering in the air after emission from the human respiratory tract) plays a role in polio transmission. Authorities are accordingly of the view that polio patients may properly be admitted to general hospital wards and that an outbreak does not warrant such measures as the closing of movies or churches.

The most generally accepted view, as the expert witnesses agreed, is that polio is ordinarily transmitted by direct and intimate contact with a person carrying the virus. The virus, however, can be carried by apparently healthy or symptomless people as well as by acute or convalescent cases. In fact, it is the existence of very large numbers of unrecognized, healthy human carriers which imposes an insuperable obstacle in the control of polio

epidemics. There is no known, practicable means of identifying such carriers.

Petitioner's own evidence was to the effect that he did not associate with the Chinese on board the vessel. However, during the vessel's first stay in Shanghai, between September 26 and November 1, 1945, petitioner went ashore on numerous occasions. He could, therefore, have contracted the disease from contacts ashore during that period. He could also have become infected by other crew members who had themselves picked up the virus ashore and who had become healthy carriers of the disease. He also could have contracted the disease through transmission by flies.

The court of appeals stated, quite correctly, that it was "impossible" to conclude that permitting the Chinese on board was the proximate cause of petitioner's disease. Other inferences, inconsistent with liability, were no less probable. As the court held, where the matter of causation is left in the dark the party having the burden of proof must fail.

III

The court of appeals characterized the trial court's finding of negligence as "highly doubtful" but found it unnecessary to rule upon it in view of its conclusion that the finding as to proximate causation was in no event warranted. We submit, as an independent ground for affirmance, that the finding of negligence is unsupported by the record.

At a minimum, there could have been no duty to exclude or isolate the Chinese in the absence of an

actual polio epidemic. There is no evidence of record that polio was epidemic in China during the relevant periods. The evidence goes no further than to indicate that there was polio ashore. Medical literature shows, moreover, that polio has a very low incidence in China, and there is unimpeachable authority that the disease has never been experienced in that country in epidemic proportions.

ARGUMENT

The question presented for decision is whether the court of appeals correctly reversed the trial court's finding of proximate causation. Point I demonstrates that this finding was improper because petitioner, according to his own testimony, was stricken by polio before the allegedly negligent conditions aboard the *Haines*, found by the trial court to have been the proximate cause of petitioner's polio, came into existence. Apart from that circumstance, we show in Point II that the court below did not exceed the permissible scope of appellate review and that it had compelling, independent reasons for reversing the proximate-causation finding. As an independent ground for affirming the decision, we urge, in Point III, that the record will not support a finding of negligence on the part of the United States.

I

The Unchallenged Finding of the Courts Below as to the Date of the Alleged Acts of Negligence Destroys the Premise of Petitioner's Claim for Relief

In admiralty, as at common law, an action predicated upon negligence may be maintained only

where (1) there has been a negligent failure to perform a legally-imposed duty to exercise care and (2) the damages ensuing were proximately caused by that negligent failure. *Owners of Brig James Gray* v. *Owners of Ship John Fraser*, 21 How. 184, 194; *Sturgis* v. *Boyer*, 24 How. 110, 124; *The Morning Light*, 2 Wall. 550, 560; *The Pleiades*, 9 F. 2d 804 (C.A. 2), certiorari denied, 270 U.S. 662; *The Perseverance*, 63 F. 2d 788 (C.A. 2), certiorari denied, 289 U. S. 744. See *Heald* v. *Milburn*, 125 F. 2d 8, 11 (C.A. 7), certiorari denied, 316 U. S. 687; cf. *Desrochers* v. *United States*, 105 F. 2d 919 (C.A. 2), certiorari denied, 308 U. S. 519.

Recognizing the first of these two requirements, petitioner has asserted negligence on the part of the United States in allowing substantial numbers of Chinese to board the *Haines* at Shanghai. (Pet. Br., pp. 9-10.) To fulfill the second requirement, *i.e.*, proximate causation, petitioner contends that the Chinese were carriers of the polio virus and exposed other members of the *Haines'* crew "to becoming carriers who in turn infected" petitioner (*id.*, p. 9). Thus, the keystone of petitioner's entire case on proximate causation is his assumption that he contracted polio, either directly or indirectly, as a result of the Chinese having been allowed to board the vessel at Shanghai.

The court below ruled that (R. 449)

> It is impossible to prove that letting Chinese come on board, assuming that conduct was negligent, was the proximate cause of libellant's disease.

More, however, is involved here than a failure to adduce sufficient proof to show proximate causation. Indeed, the chronology of events on which petitioner relies and the concurrent factual findings of the district court and the court of appeals indicate that petitioner's polio could not have resulted from the action of the United States in allowing the Chinese to board the vessel at Shanghai.

Two dates are obviously critical in determining whether there was any possibility of proximate causation between the Government's conduct in allowing the Chinese to board the vessel and petitioner's polio. These two dates are the date on which the Chinese were first permitted aboard and the date on which petitioner first experienced polio symptoms.

In his findings of fact, the trial judge expressly found that the *Haines* "took a short trip to Hong Kong and arrived back at Shanghai on November 11, 1945. *At that time* a number of Chinese coolies were allowed to come aboard to perform stevedoring work, and prior to the ship's departure for Tsingtao on November 23, 1945, 40 to 50 Chinese soldiers, in addition to 25 Chinese truckdrivers and 25 Chinese mechanics, were also taken aboard as passengers." (R. 432.) (Emphasis added.) The opinion accompanying the findings emphasizes the fact that the Chinese boarded the *Haines* after the vessel's return to Shanghai on November 11, 1945, and reiterates the language of the finding that it was "at that time," between November 11 and 23, 1945, that the Chinese were allowed aboard (R.

427). Moreover, the court of appeals, in reviewing the evidence, specifically and independently found (R. 447) that the *Haines* sailed on November 1, 1945,

> for Hong Kong, arriving November 5, and again left for Shanghai on November 7, arriving November 11. *During her second stay in Shanghai*, Army trucks for the Chinese Nationalist Army were loaded on board with the help of Chinese coolies, and Chinese soldiers and mechanics were taken on board to be transported to Tsingtao. Much of the controversy in this case concerns the adequacy of the facilities set up for the Chinese, and the precautions taken by the master of The Haines to keep the Chinese segregated from the crew. The court below found that although toilet facilities were provided for the Chinese, in the manner of a temporary wooden trough extending over the ship's side, the master had made no arrangements to keep the Chinese personnel from using the ship's regular toilet facilities; that in fact Chinese personnel used the crew's toilet facilities and also used a common drinking fountain on the ship's deck and, on one or two occasions, the libellant was required to go up on deck and open the valve for the temporary latrine. As a result of these conditions the libellant claims to have contracted poliomyelitis. [Emphasis added.]

Petitioner has not challenged the independent but concurrent finding of both the trial court and

the court of appeals that the Chinese boarded the vessel on or after the *Haines'* return to Shanghai on November 11, 1945. Nor, we submit, could an attack on that findings be of any avail. Under the "two-court" rule, this Court does "not, in admiralty, more than in other cases, review the concurrent findings of fact of two courts below." *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 98-99; *Just* v. *Chambers*, 312 U. S. 383, 385; *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 510; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 145; *The Wilderoft*, 201 U. S. 378, 387; *The Carib Prince*, 170 U. S. 655, 658; see also *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275, decision adhered to on rehearing, 339 U. S. 605.

Petitioner has consistently taken the position that his illness began on or before November 11, 1945. His petition for certiorari and his brief on the merits emphasize that he "first took sick about the 9th or 10th of November, 1945, while the vessel was on the voyage from Hong Kong back to Shanghai" (Pet. p. 7; Pet. Br. p. 7). It was on this "voyage from Hong Kong back to Shanghai" that petitioner testified he "first didn't feel too well" (R. 78). McLeod, another member of the *Haines'* crew, also testified that "on the voyage from Hong Kong to Shanghai, that is, our second voyage, Mr. McAllister at that time complained of feeling bad" or "feeling stiff, not being able to get around" (R. 197, 199). And it was at that time that McAllister himself noted his first polio symptoms, which he described as "stiffness of the neck."

"dizziness," "difficulty in swallowing," and pain primarily in the "back of the neck at the base of the head" (R. 21, 22, 30, 169). Petitioner's own medical expert testified that these symptoms "indicated the imminence of bulbar polio" (R. 106).

In reviewing the jury verdict returned in McAllister's favor after the *first* trial, the court of appeals referred to evidence that Chinese stevedores and passengers boarded the *Haines* the first time it docked in Shanghai, *i.e.*, between September 26 and November 1,[7] and that McAllister fell ill on November 11. 169 F. 2d at 5-6.[8] Thus, in that case, there was some logical basis (apart from whether the burden of proving proximate causation was satisfied) for believing that there could be a connection between the Chinese coming aboard ship and McAllister's contraction of polio. As pointed out above, in the instant case the district

[7] There was a conflict in the evidence at the first trial. Thus, Linnartz, chief mate of the *Haines*, testifying from the logbook, stated that "the stevedores started coming aboard—that would be at one o'clock on November 13th. That would be the first day they were aboard." No. 351, Oct. Term, 1948, R. 33-34. Again, in answer to the questions "What were the dates when these people came aboard? During what period of time?" he replied, "From the 13th of November through the 23d." *Id.*, R. 35. However, Bullis, another member of the crew, testified that the stevedores came aboard the vessel on both visits to Shanghai. He testified without the aid of the logbook, stating, "I can't refer to actual dates because I don't know unless I have the logbook." *Id.*, R. 334. Neither of these witnesses testified at the second trial.

[8] The court went on to point out that "the 'commonest' period of incubation for polio is twelve to fourteen days, which would have begun during his prior stay at Shanghai * * *" (169 F. 2d at 6).

court and the court of appeals both found that the evidence showed that the Chinese first came aboard when the ship docked at Shanghai the second time, *i.e.*, on or after November 11.

At the second trial, *i.e.*, in this case, the district court made no specific finding as to the date on which McAllister became ill, making reference only to the date (November 24) on which he officially reported his illness to the ship's purser (R. 433). The trial judge may have overlooked the relevancy of petitioner's testimony that the symptoms of his illness (stiffness of the neck, dizziness, difficulty in swallowing, head pains) had appeared some two weeks before the date shown on the report (see pp. 4-6, *supra*). Or, conceivably, the trial judge may have decided, for reasons which he did not state, that petitioner's testimony on this point, though unequivocal, was not to be credited. In any event, there is a fatal inconsistency between petitioner's claim, based on an illness commencing on or before November 11, and the finding of the district court, in which the court of appeals concurred, that the act of taking the Chinese on board took place after the *Haines* made its second stop in Shanghai. The findings of the district court furnish no rational means of bridging this inconsistency. Thus, entirely apart from the other considerations, relied upon by the court of appeals, which militate against the conclusion that petitioner established proximate causation, it appears that the unchallenged finding of the lower courts as to the date of the alleged acts of negli-

gence stands in the path of petitioner's claim as he makes it.[2]

II

The Court of Appeals Adopted the Appropriate Standard of Review. It Correctly Applied That Standard When It Concluded, for Reasons Independent of Those Discussed Under Point I, That the Trial Court's Finding of Proximate Causation Could Not Be Sustained.

In Point I, we have emphasized a key factor—the inconsistency as to dates—which plainly demonstrates that the trial court's finding of proximate causation was not well founded. The court of appeals' opinion does not rely on this factor. It has a broader base. On that court's reasoning, even assuming that the act of taking the Chinese on board antedated petitioner's illness, there still was no sufficient foundation for the inference that the asserted acts of negligence were the proximate cause of injury. Before turning to the court of appeals' analysis of the evidence and findings, we shall discuss petitioner's contention that the court misapprehended the scope of review.

Petitioner asserts that "the evidence adduced at the trial of the case at bar was held by the Court below as sufficient to sustain a jury's verdict" in the former action at law under the Jones Act against the General Agent (Pet. Br., p. 14). From this it follows, petitioner contends, that the court below should have sustained the admiralty judge's finding in his favor in the instant case. The failure

[2] The broader grounds of reversal, upon which the opinion of the court of appeals rests, are discussed below.

to do so, it is argued, results from the court's mistaken notion that "the same evidence which was sufficient on the law side, was insufficient on the admiralty side of the Court" (Pet. Br. p. 13).[10]

At the outset, it should be made plain that the court of appeals did not hold that it had greater freedom to review an admiralty finding than a law finding.[11] It observed that the jury which heard the evidence at the first trial "traditionally had more scope in reaching its result than would the judge in the present case" (R. 448). It also pointed out, in this connection, that the jury verdict in the suit against the General Agent was a general verdict "based on either negligence in treatment and care, or negligence in creating conditions conducive to polio," and that it had been "impossible to tell upon which theory the jury relied" (*ibid.*).[12] In short, the permissible scope of review was regarded as less restricted in the second case, not because it was a suit in admiralty rather than one at law, but because it was tried before a judge rather than before a jury. In this view, the court of appeals was clearly correct.

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[10] While we proceed to an immediate discussion of petitioner's contentions as to the scope of review, we note our disagreement with petitioner's suggestion that the evidence was "the same." A mere comparison of the rosters of witnesses who appeared in the two cases shows that this is not so. We have already indicated one significant difference in the two records. See p. 21, note 7, *supra*.

[11] Accordingly, *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, on which petitioner relies, is not in point.

[12] Cf. *Stokes* v. *United States*, 264 Fed. 18, 23 (C.A. 8).

A. *A Court of Appeals Has Greater Latitude and Power in Reviewing a Trial Judge's Findings Than It Does In Reviewing a Jury Verdict*

Constitutional requirements, the substance and history of pertinent statutory provisions, and important policy considerations point unmistakably to the conclusion that a court of appeals has greater latitude in reviewing a trial judge's findings than in reviewing a jury verdict.

1. The Seventh Amendment to the Constitution declares that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Amendment, while not defining the precise extent to which the jury verdict is binding, makes clear that the essential powers of the jury, as they existed when the Bill of Rights was adopted, are not to be impaired. *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364, 377; *Parsons* v. *Bedford*, 3 Pet. 433, 446-448. When a jury tries the facts a court of appeals may set aside its verdict only if it determines that the evidence supporting it is not "substantial." "Substantial evidence," this Court has pointed out (*NLRB* v. *Columbian Co.*, 306 U.S. 292, 300), means evidence which

> is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *."

Under this "substantial evidence" rule, a jury has the right to weigh the evidence and draw inferences from it, subject only to the limitation that the ultimate conclusion be one which a reasonable man could reach. And a reviewing court may not substitute its judgment for that of the fact-finding jury because a different conclusion would also be reasonable or because the appellate court thinks the jury's decision erroneous. *Gunning* v. *Cooley*, 281 U.S. 90, 93.

No similar constitutional restriction exists with respect to a trial court's findings of fact. *Sanders* v. *Leech*, 158 F. 2d 486, 487 (C.A. 5); *Aetna Life Ins. Co.* v. *Kepler*, 116 F. 2d 1, 4-5 (C.A. 8); see *Galloway* v. *United States*, 319 U.S. 372. Such findings may be set aside when they are "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure. A finding is "clearly erroneous" and hence reversible when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339; *United States* v. *Gypsum Co.*, 333 U. S. 364, 395. [13]

The "clearly erroneous" test, governing review of a trial court's findings of fact, while expressly adopted for civil cases by Rule 52(a) of the Fed-

[13] See, also, this Court's statement in *District of Columbia* v. *Pace*, 320 U.S. 698, 702, that review of a jury verdict is "much more restricted" than review in equity practice under the "clearly erroneous" rule.

eral Rules of Civil Procedure, is also applicable to cases in admiralty. Every court specifically passing on the point has so held. *Petterson Lighterage & Tow Corp.* v. *New York Central R. Co.*, 126 F. 2d 992, 994 (C.A. 2);[14] *Union Carbide & Carbon Corp.* v. *United States*, 200 F. 2d 908, 910 (C.A. 2); *Boston Ins. Co.* v. *Dehydrating Process Co.*, 204 F. 2d 441, 444 (C.A. 1); *Colvin* v. *Kokusai Kisen Kabushiki Kaisha*, 72 F. 2d 44, 46 (C.A. 9); *C. J. Dick Towing Co.* v. *The Leo*, 202 F. 2d 850, 854 (C.A. 5), *Walter G. Hongland, Inc.* v. *Muscovalley*, 184 F. 2d 530 (C.A. 6), certiorari denied, 340 U.S. 935; *Kochler* v. *United States*, 187 F. 2d 933, 936 (C.A. 7); *Frost* v. *Saluski*, 199 F. 2d 460 (C.A. 7). It is immaterial for this purpose that the suit in admiralty is one against the United States pursuant to the Suits in Admiralty Act. *Capellen* v. *United States*, 185 F. 2d 754 (C.A.D.C.)

2. R.S. 649, re-enacted as part of the Act of March 3, 1865 (13 Stat. 500, 501, 28 U.S.C. 773 (1940 ed.)), provided that where an issue of fact in a civil cause is tried by the district court without a jury, the finding of the court "shall have the same effect as the verdict of a jury." While the statute

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[14] In the *Petterson* case, the Court of Appeals for the Second Circuit was at pains to point out that it does not claim a broader power in reviewing findings in admiralty appeals than it exercises under Rule 52(a), Federal Rules of Civil Procedure, 126 F. 2d at 994.

If the power in such cases were broader, that, of course, would only furnish an additional reason for affirmance of the court of appeals' decision in the instant case.

was in effect, it was consistently held that on appeal from the trial judge's finding, just as on an appeal from a jury verdict, the only matter open to consideration was whether there was "substantial evidence" to support the trial court's factual finding, and that "To review the evidence was beyond the competency of the [appellate] court." *State Farm Insurance Co.* v. *Coughran*, 303 U.S. 485, 487. And see *United States* v. *Jefferson Electric Co.*, 291 U.S. 386, 407; *McCaughn* v. *Real Estate Co.*, 297 U.S. 606.

Rule 52(a) of the Federal Rules of Civil Procedure, which prescribed for all non-jury cases the "clearly erroneous" rule traditionally followed by courts of equity, was designed to effect a basic change. As stated in the notes of the Advisory Committee on the Rules for Federal Civil Procedure:

> The provisions of U.S.C., Title 28, §§773 (Trial of issues of fact; by court) and 875 (Review in cases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of *Subdivision (a)* [*i.e.*, that findings of fact shall not be set aside unless "clearly erroneous"] accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there

> was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.[15]

It is particularly significant that Rule 52(a), in contrast to R.S. 649, expressly requires the trial court sitting without a jury to "find the facts specially." To similar effect, see Admiralty Rules, Rule 46½. Since general findings frequently present an insuperable obstacle to effective appellate review (see *Dearborn Nat. Casualty Co.* v. *Consumers Petroleum Co.*, 164 F. 2d 332 (C.A. 7); *Desch* v. *United States*, 186 F. 2d 623 (C.A. 7)), the district court is required to set forth the specific factual findings upon which its judgment is based. *Kelley* v. *Everglades District*, 319 U.S. 415; *Dalehite* v. *United States*, 346 U.S. 15, 24, fn. With this "essential aid," the reviewing court is equipped not only to examine the subsidiary determinations of fact but to test the validity of the inferences upon which the ultimate conclusion of liability is rested. *Virginia Ry.* v. *United States*, 272 U.S. 658, 675; *Interstate Circuit* v. *United States*, 304 U.S. 55, 56.[16]

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[15] See, generally, *Petterson Lighterage & Tow Corp.* v. *New York Central R. Co.*, 126 F. 2d 992 (C.A. 2); *Katz Underwear Co.* v. *United States*, 127 F. 2d 965 (C.A. 3); *Guilford Construction Co.* v. *Biggs*, 102 F. 2d 46, 47 (C.A. 4); *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. 2d 412 (C.A. 8); *Aetna Life Ins. Co.* v. *Kepler*, 116 F. 2d 1, 4-5 (C.A. 8).

[16] Petitioner's earlier suit against the General Agent aptly illustrates how a general verdict may draw a curtain upon the subsidiary findings and the reasoning of the initial trier of the facts. The appellate court was unable to ascertain whether the jury's verdict was rested on negligence in providing treatment and care or on negligence in permitting conditions conducive to the contraction of polio. R. 448.

3. Jury determination of factual questions allows decisions to be made by persons embodying the underlying sense of fairness of the community, rather than by a single man, no matter how expert. This is doubtless the reason that Anglo-American jurisprudence has adhered to the position that appellate review of a jury verdict is highly restricted. This reason, of course, does not apply to appellate review of the findings of a trial judge. See Stern, *Review of Findings of Administrators, Judges and Juries*, 1944, 58 Harv. L. Rev. 70, 82. The judges of both trial and reviewing courts are drawn from the same section of the populace. Except for the difference in numbers, one court is no more representative of the community than the other. Indeed, to the extent that a group of men is more representative than a single person, the appellate court resembles a jury more than does the trial judge. Since the appellate courts occupy a superior position in the judicial hierarchy, the appellate judges are certainly likely to be no less capable of evaluating a record, and, of course, the decisions of the appellate courts have the advantage of collaboration and interchange of ideas. There is, therefore, ample policy justification, as well as abundant authority, for allowing the appellate court to reverse a trial judge's finding when, despite the presence of some evidence to support the trial court's factual finding, the reviewing court is left with the definite and firm conviction that the trial judge has erred. *United States* v. *Gypsum Co.*, 333 U.S. 364, 395.

B. *The Court of Appeals Correctly Determined That the Finding of Proximate Causation Could Not Be Sustained*

The primary responsibility for determining whether a trial judge's findings are clearly erroneous is vested in the initial reviewing court. Cf. *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502, 503. This Court "will intervene only * * * when the standard [of review] appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 490-491; *Radio Corp.* v. *United States*, 341 U.S. 412, 415.

The opinion below shows that the court of appeals reversed because it had the firm and definite conviction, based upon its examination of the record, that the evidence did not support the trial judge's finding of proximate causation (R. 449). There is plainly no misapprehension of the reviewing function involved (*supra*, pp. 25-29). And the court of appeals' conclusion, we submit, was fully warranted.

The trial court's holding of liability rests upon its subisdiary findings to the effect that the Master of the *Haines* took inadequate precautions in relation to the Chinese who boarded the vessel at Shanghai. The court of appeals was of the view that the assumed relationship between the Master's acts or omissions in this regard and petitioner's contraction of polio was so speculative in the light of the relevant knowledge and circumstances (inconsistency as to chronology apart; see Point I,

supra) that proximate causation could not be deemed established. It pointed to other equally probable hypotheses as to the causation of petitioner's malady. The soundness of its determination requires a consideration of the existing knowledge relating to poliomyelitis and the particular known circumstances bearing on petitioner's contraction of the disease.

1. The epidemiology and modes of transmission of polio are still a mystery to medical science. Petitioner's own expert conceded that "we are not sure of where an individual gets his disease" (R. 125). Dr. Albert B. Sabin, a foremost polio epidemiologist,[17] points out that the profession is "bewildered" and "that physicians do not know the answers to these and other basic questions regarding the origin and evolution of epidemics of poliomyelitis." *The Epidemiology of Poliomyelitis*, Sabin, A.B., 134 American Medical Association Journal 749, 756 (1947). The various answers which have been suggested are still in the conjectural stage.

It has been suggested, for example, that the polio virus "is transmitted through the upper respiratory tract," and the virus has been "detected in the upper respiratory passages of human cases of the disease." *The Epidemiology of Poliomyelitis*, Aycock, 22 Long Island Medical Journal 579 (1928). However, while the virus is present for a short time in the throat, there is "no evidence that the virus is ordinarily present in the nose or

[17] See bibliography at R. 421-423.

that droplets emitted from the respiratory tract play a significant role, if any, in the dissemination of the virus." *The Epidemiology of Poliomyelitis*, Sabin, A. B., 134 American Medical Association Journal 749, 756 (1947). It is for that reason that "Measures designed to minimize spread by droplet infection, such as the closing of movies and churches or the refusal to admit patients with poliomyelitis on general hospital wards are not warranted." *Ibid.*

Flies have long been suspected of carrying or transmitting polio.[18] The fact that polio is epidemic in late summer and autumn and that outbreaks diminish with the onset of colder weather furnishes some confirmaton. UNRRA Health Division Bulletin of Communicable Diseases dated December 26, 1945, Vol. 3, No. 113, p. 42; R. 367. The theory is that contaminated flies may deposit

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[18] Rosenau, M. J., *Poliomyelitis Transmitted by the Biting Fly*, 27 Public Health Reports 1593 (1912); Anderson, J. F., and Frost, W. H., *Transmission of Poliomyelitis by Means of the Stable-Fly*, 27 Public Reports 1733 (1912); Paul, J. R., Trask, J. D., Bishop, M. B., Melnick, J. L., and Casey, A. E., *The Detection of Poliomyelitis Virus in Flies*, 94 Science 395 (1941); Trask, J. D., and Paul, J. R. *The Detection of Poliomyelitis Virus in Flies Collected During Epidemics of Poliomyelitis*, 77 Journal Experimental Medicine 545 (1943); Sabin, A. B., and Ward, R., *Flies as Carriers of Poliomyelitis Virus in Urban Epidemics*, 94 Science 590 (1941); Rendtdorff, R. C., and Francis, T., Jr., *Survival of the Lansing Strain of Poliomyelitis Virus in Common House Fly*, 73 Journal Infectious Diseases 198 (1943); Melnick, J. L., *Isolation of Poliomyelitis Virus from Single Species of Flies Collected during Urban Epidemics*, 49 American Journal of Hygiene 8 (1949); Ward, R., Melnick, J. L., and Horstmann, D. M., *Poliomyelitis Virus in Fly-Contaminated Food Collected at an Epidemic*, 101 Science 491 (1945). See, also, R. 366, 367.

infective amounts of virus on food and that such "contaminated food can produce the disease." *The Epidemiology of Poliomyelitis*, Sabin, A. B. 134 American Medical Association Journal 749, 756 (1947).

Whether or not the virus may be waterborne is far from clear. It has been noted that swimming-pool water "may easily become infected with the virus from infected persons. It is less obvious how often, if ever, this virus infects susceptible swimmers. Theoretically it has ample opportunity for doing so. The evidence incriminating swimming bath water in epidemics is doubtful, however." Gear, J. H. S., *The Extrahuman Sources of Poliomyelitis*, Paper Presented at the Second International Poliomyelitis Conference 343, 346 (1952).

While sewage has been regarded by some as a potential source of the infection, it is a "peculiar circumstance" of polio epidemics that they "have occurred with greatest frequency and severity in the very countries in which sanitation and hygiene have undoubtedly made their greatest advances." *The Epidemiology of Poliomyelitis*, Sabin, A. B., 134 American Medical Association Journal 749 (1947).

The hypothesis accepted by both petitioner's and the Government's expert witnesses was that the most likely method of transmission was by direct and intimate contact with a person carrying the virus (R. 103, 237; see Sabin, *Transmission of Polio Virus: Analysis of Differing Interpretations*

and Concepts, 39 Journal of Pediatrics 519 (1951)). There seems to be virtually no doubt that the polio virus can be carried by apparently healthy or "contact symptomless" people as well as by acute or convalescent cases. UNRRA Health Division Bulletin of Communicable Diseases, December 26, 1945, vol. 3, No. 113, p. 40. It is this existence of large numbers of unrecognized human carriers which "imposes an insuperable obstacle in the control of a large epidemic." Sabin, *Transmission of Polio Virus: Analysis of Differing Interpretations and Concepts*, 39 Journal of Pediatrics, 519, 528 (1951).[19]

2. It is significant, so far as this last hypothesis is concerned, that petitioner testified that he did not associate with the Chinese on board (R. 163). However, while the vessel was in Shanghai, between September 26 and November 1, 1945, petitioner did go ashore on numerous occasions, patronizing the hotels, various stores, movies and restaurants (R. 21, 30, 82, 163, 165). He also spent a great deal of his time ashore visiting with his friend, the Army sergeant, and apparently with other persons to whom the Army sergeant had introduced him (R. 82, 163, 165). Since, as his own medical expert testified, the incubation period of polio virus is scientifically uncertain (R. 125, 385), petitioner might well have contracted the virus ashore between September 26 and November 1, 1945

[19] One expert testified that "we now know that there are 200 or 300 people infected for every one or two who develop paralysis" (R. 237).

(R. 125).[20] It is also entirely possible, on petitioner's evidence, that he became infected by crew members who had picked up the virus while ashore and who had become healthy or symptomless contact carriers of the disease.[21]

Petitioner's own evidence, therefore, fails to establish a causal connection between the alleged negligence of the Master in allowing the Chinese on board ship and petitioner's illness. As observed by the court below, the evidence shows that "the infection might well have arisen from various causes unrelated to the respondent's action." (R. 448-449.) Because the incubation period ranges from a few days to 30 or 35 days, the court noted that petitioner "might have become infected while on shore leave in Shanghai before November 1. Moreover, he might have become infected by flies or by members of the crew who were carriers of the disease. Under these circumstances to hold the respondent liable for injuries suffered by the libellant seems to be wholly speculative." (R. 448.)

3. There can be no serious question that the court of appeals was correct in holding that when the evidence relied upon does no more than establish a possibility, there being numerous possible infer-

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[20] While extremely variable, the incubation period may range from as brief a period as three days to as long as 35 days, with a great many of the cases developing after a four-to-ten day period following exposure to the virus. *Diagnosis and Treatment of Poliomyelitis in the Early Stage*, Anderson, J., Papers presented to the First International Polio Conference, pp. 109, 110 (1949); R. 125, 385.

[21] The evidence showed that no other persons on the voyage came down with the symptoms of the disease (R. 320).

ences some of which are inconsistent with liability, "the party having the burden of proof must lose" (R. 449). In "that class of cases where proven facts give equal support to each of two inconsistent inferences," judgment, this Court has stated, "must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * *." *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339. The Court has explicitly enjoined juries and judges from "guessing" in those cases "where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not * * *." *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 663. To similar effect, see *United States* v. *Huff*, 175 F. 2d 678 (C. A. 5); *Carolina Life Insurance Co.* v. *Williams*, 210 F. 2d 477 (C. A. 5); *United States* v. *Barry et al.*, 67 F. 2d 763 (C. A. 6); *United States F. & G. Co.* v. *Des Moines Nat. Bank*, 145 Fed. 273, 277-280 (C. A. 8); *Stirk* v. *Mutual Life Ins. Co. of New York*, 199 F. 2d 874, 877 (C. A. 10).[22]

The case of *Goodrich* v. *United States*, 5 F. Supp. 364 (S. D. N. Y.), affirmed on opinion below, 67

[22] The four cases upon which petitioner relies (Pet. Br., p. 18)—*Wilkerson* v. *McCarthy*, 336 U.S. 53; *Tennant* v. *Peoria and P. U. Ry. Co.*, 321 U.S. 29; *Lavender* v. *Kurn*, 327 U.S. 645; *Myers* v. *Reading Co.*, 331 U.S. 477—are not in conflict. All of them are cases in which the jury could reasonably have found that a preponderance of evidence showed a causal relationship between the defendant's negligence and the plaintiff's injury. But even if these cases be read as making inroads on the *Chamberlain* doctrine, they bear only upon the scope of the jury's traditional powers; they do not suggest a more restrictive interpretation of Rule 52(a).

F. 2d 994 (C. A. 2), is of particular interest because of its obvious similarities to the instant case. Recovery was sought on behalf of the estate of a seaman who had died from typhoid fever allegedly caused by the ship's drinking water. In dismissing the libel, Judge Patterson stated:

> The typhoid bacilli may have come on board in the water, in the food, in a carrier who later in some way contaminated the water or the food, or in some other manner. One guess is as good as another. The libelant has endeavored to fasten the guilt on the water. I think, however, that the matter is left wholly in the dark. In any event, whether the bacilli came from the water or not, no culpable negligence has been shown as to the water or in fact as to any other condition aboard.

It was similarly improper here to "fasten the guilt" upon the Chinese who came aboard the ship (assuming, as we have throughout this section of the brief, that they came aboard in time to be possible "suspects"). That "guess" certainly was no better, no more demonstrably sound, than any of the others.

III

The Decision Below Should Also Be Affirmed on the Independent Ground That the Record Does Not Support the Finding of Negligence

The district court's conclusory finding that the Master negligently created or permitted shipboard

conditions conducive to polio has no evidentiary basis in the record.[23] The entire thrust of petitioner's claim is that a polio epidemic was raging in Shanghai in November of 1945 and that the Master, therefore, should not have allowed the Chinese to come aboard. Certainly, if in fact there was no polio epidemic in Shanghai, there could have been no duty to exclude the Chinese from the vessel,[24] or to put them in complete isolation while they were on board.

The evidence in the record and available medical literature establish beyond question that there was no epidemic of polio in Shanghai at the time in question. In fact, the only evidence in the record directly concerned with the "incidence of poliomyelitis in an epidemic or endemic form in China" was to the effect that "poliomyelitis is endemic

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[23] The court of appeals characterized the finding of negligence as "highly doubtful," but found it unnecessary to decide that question in view of its conclusion that proximate causation was in no event established (R. 448).

[24] While we do not believe that there is any necessity to reach the point, we also note (a) that the Chinese passengers (soldiers, truck drivers, mechanics, etc.) who were taken on board the *Haines* were carried by direct order of the United States Army (R. 401-406, 447), and (b) that if there was any negligence in taking them on the vessel it was that of the Army. Such negligence, if it existed, would not be actionable. Attempts to burden the Government with damages or loss incident to military operations have been consistently rejected. *Respublica* v. *Sparhawk*, 1 Dall. 357; *United States* v. *Pacific Railroad*, 120 U.S. 227, 234; *Hijo* v. *United States*, 194 U.S. 315; *Herrara* v. *United States*, 222 U.S. 558; *Perrin* v. *United States*, 4 C. Cls. 543, 12 Wall. 315; *Wilson* v. *Interocean S.S. Corporation*, 163 F. 2d 459, 461 (C.A. 9). Cf. Federal Tort Claims Act of 1946, 28 U.S.C. 2680 (j), (k).

and occurs in sporadic form, but not in epidemic form, in China" (R. 359).[20]

This testimony finds strong support in the medical reports and other medical literature on which it was based (R. 359). In 1930, it was reported that "During the past eight years among 25,000 admissions to the Peiping Union Medical College Hospital there has been only one diagnosis of this disease. A careful search through the index of the China Medical Journal has failed to reveal any report dealing with the condition or relating to the frequency of its occurrence. Jefferys and Maxwell, in their book 'Diseases of China,' have stated that the disease is a rare one." Zia, S. H., *The Occurrence of Acute Poliomyelitis in North China*, 16 National Medical Journal of China 135 (1930). A 1938 study as to the incidence of polio in China pointed out that "So far as the writer has been able to learn there is no record of epidemic poliomyelitis in China as it occurs in western countries." Scott, A. V., *Anterior Poliomyelitis in China*, 54 Chinese Medical Journal 442 (1938). And, noting that "it was not likely that a large epidemic of poliomyelitis could have been over-looked even in China," the author concluded that there were "no records indi-

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[20] The quoted statement is from the testimony of respondent's expert witness. Even petitioner's expert witness did not claim that any polio epidemic existed in Shanghai in 1945. When questioned directly by the court as to the existence of a polio epidemic in Shanghai in 1945, petitioner's witness replied: "If you are asking specifically, do I know whether there was an epidemic of polio there, your Honor, I don't." (R. 102.)

cating that poliomyelitis has occurred in epidemic in China." *Id.* at pp. 442, 447.

Again, in 1948, another author, collecting the available data on the incidence of polio in China, explained that

> "The high incidence of poliomyelitis in this country [that is, the United States] induced [the author] to detail the *contrasting* picture in China and to review available reports, tending to show the significant differences between our two countries. [Emphasis added.] [Pi, C. C., *Poliomyelitis in China*, 2 American Practitioner 565 (1948).]

The same author further notes that "during the war, over a period of six years, I saw two patients with acute poliomyelitis in Cheng-tu, Ssue-Chwan Province. There never has been any noticeable epidemic of poliomyelitis." *Id.* at 565-566. This contrast between the relatively high incidence of polio in cities like New York and Chicago and the relative freedom from polio of cities like Shanghai, occupying approximately the same latitude, was also noted by Dr. Sabin in 1947:

> Another peculiar circumstance which may contain an important clue is that epidemics have occurred with greatest frequency and severity in the very countries in which sanitation and hygiene have undoubtedly made their greatest advances. In my opinion one of the most important problems in the epidemiology of poliomyelitis is the determination of

> the factors relative to the virus, host and environment, which are different in cities like New York, Chicago, Minneapolis, Los Angeles and Denver, among many others in the United States with histories of large outbreaks of the disease, and *cities like Peiping, Tientsin and Shanghai, occupying approximately the same latitude in China, in which only rare sporadic cases have been recorded thus far, despite the presence in these cities for many years now of excellent western-trained physicians who could not have missed such outbreaks in the native population if they had occurred.* [Emphasis added.] [*The Epidemiology of Poliomyelitis*, 134 American Medical Association Journal 749 (1947).]

The following year Dr. Sabin again observed:

> There are no statistical data available for China and Korea, but the observations of many physicians in such population centers as Peiping, Tientsin, Shanghai and Seoul indicate that paralytic poliomyelitis is rare and infantile in the native population, and that it is most unlikely that epidemics have occurred and were missed. [Sabin, *Epidemiologic Patterns of Poliomyelitis in Different Parts of the World*, Paper presented at the First International Polio Conference, p. 20 (1948).]

In addition, the reports published in the Epidemiological Information Bulletins issued by

UNRRA's Health Division during 1945 show that no polio cases were reported for China. An article by Fan entitled "Communicable Diseases in China during Recent Years," reprinted in UNRRA's Epidemiological Information Bulletin for July 31, 1945, discusses epidemics of smallpox, typhus, and cholera, but does not even refer to polio. See pages 495-536 of the July 31, 1945 issue of the Bulletin. Similarly, none of the periodic issues of the Chinese Medical Journal for the years 1945-1946 mention any polio epidemic. If poliomyelitis had been a problem in China in 1945 or appeared there in epidemic form, it is safe to assume that it would have been noted in UNRRA's Information Bulletin for 1945 or in the contemporary issues of the Chinese Medical Journal.

In opposing this body of consistent and persuasive evidence that polio has never appeared in epidemic form in Shanghai or elsewhere in China, petitioner relies exclusively on an ambiguous statement in the Master's deposition that he had posted notices on the ship warning the crew "about various diseases that might be contracted ashore" and that he had been warned that polio was all over "in China and all through the tropics" (*R.* 31, 81-82, 399-400).[28] But the notice, far from reflecting the actual existence of an epidemic of polio in Shanghai, was apparently a routine, standing order, issued pursuant to instructions from Washington, warning the crew generally against venereal and

[28] As noted *supra* (p. 36, note 21), no polio case other than petitioner's occurred on the *Haines*.

other contagious diseases (R. 305, 306, 399, 400, 405, 407-408). It was the type of notice "that would be posted in any port you went into" (R. 301). It "would be a general notice that would be applicable almost any place that the ship touched where the sailors went ashore" (R. 301). The Government's instigation of such precautionary notices to its personnel (see R. 400), calling attention to the danger, in certain parts of the world, of a number of contagious diseases, does not indicate—certainly, it does not prove—that one of the named diseases existed in a particular city, at a particular time, in epidemic proportions. The notices may have reflected no more than commendable zeal on the part of wartime officials concerned with the protection of military personnel and merchant marines to keep diseases in our forces to the irreducible minimum. Indeed, the trial court itself stated that the notices did "not [show] that there was an epidemic" of polio, but "only that there was polio ashore" (R. 379, 431; see, also, R. 101-102).[27]

Thus, even making the highly questionable assumption that techniques of quarantine are required when there is an outbreak of polio (see *supra*, pp. 32-35), the fact remains that there is nothing in this record to establish that there was an epidemic of that disease in Shanghai in 1945.

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[27] Similarly, in the prior case against the General Agent, the trial judge expressed the opinion that there was no evidence that polio was prevalent in the area. No. 351, Oct. Term, 1948, R. 514.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Sections 1 and 2 of the Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 46 U.S.C. 741 *et seq.*) provide as follows:

> SEC. 1. That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them reside or have their principal place of

business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

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